IN THE

Supreme Court of the United States

October Term, 1978

No. 78-400

ANTHONY HAHN-DiGUISEPPE,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Preliminary Statement

By a judgment of the New York State Supreme Court, New York County, rendered on June 11, 1975, petitioner Anthony Hahn-DiGuiseppe and co-defendant Anthony Argibay were convicted, after trial by jury (before Coon, J.), of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE [N.Y. Penal Law Sec. 220.41] and were each sentenced to a term of six years to life imprisonment, which they are currently serving. Their convictions were affirmed by the Appellate Division, First Department, on

April 14, 1977, with one judge dissenting (reported at 57 A.D.2d 520).

The New York Court of Appeals unanimously affirmed the convictions on June 15, 1978 (45 N.Y.2d 45), holding, *inter alia*, that since no objection was made to the trial judge's instructions concerning the law of agency, petitioner DiGuiseppe's claim of error in those instructions was not preserved for review. The Court of Appeals also held that, since defense counsel had declined the trial judge's instructions concerning the law of agency, petitioner DiGuiseppe's claim of error in those instructions resenting co-defendant Argibay, the defendants waived any rights they might otherwise have had on appeal with respect to that issue. Petitioner DiGuiseppe's motion for reargument was denied by the Court of Appeals on September 14, 1978.

Petitioner now seeks a writ of certiorari to review the order of the New York Court of Appeals, entered on June 15, 1978.

Statement of the Case

As the evidence at trial clearly established, on June 13, 1975, Anthony Argibay, petitioner Anthony DiGuiseppe and petitioner's younger brother, Joseph DiGuiseppe, sold almost an ounce of cocaine to an undercover police officer for $1,700. A week before the sale was consummated, Joseph DiGuiseppe had introduced two undercover police officers, Robert Sievers and Robert Siebert, to petitioner Anthony DiGuiseppe. Petitioner took the two officers to the building in which the "connection's" apartment was located and told the officers to wait while he went inside.

The transaction was not completed on that date, however, since petitioner had not emerged from the connection's building by the time the agents decided to leave.

Joseph DiGuiseppe subsequently telephoned Officer Sievers and arrangements were made for the transaction to take place on June 13. Officers Sievers and Siebert again met the DiGuiseppe brothers, and were taken to the same location. Petitioner Anthony DiGuiseppe ascertained that Officer Sievers had the money for the purchase of the cocaine, and then took Sievers to Argibay's apartment, where the exchange was to be made. Argibay instructed Sievers and petitioner to wait in the kitchen so they would not see the person who brought the cocaine into the apartment. The delivery was made, the cocaine was tested and weighed, and, after some dispute over the weight, Sievers paid Argibay $1,700 and received just less than an ounce of cocaine. Sievers gave petitioner a grain of cocaine "off the top," and then saw money change hands from Argibay to petitioner. When Sievers asked how he could reach Argibay to purchase more cocaine, he was instructed to deal through petitioner.

A week and a half later, Officer Sievers called petitioner about an additional purchase, but was told that Argibay was not then interested in selling any drugs. Petitioner offered to get back to Sievers about obtaining cocaine from another source. Time passed without any return call from petitioner, and Officer Sievers went to Argibay directly to try to make a purchase. Argibay indicated that he was not making enough money to warrant his continued involvement in the narcotics trade, and declined to sell any more cocaine.

Argibay and the DiGuiseppe brothers were arrested and arraigned in September 1975 on charges of criminal sale of a controlled substance in the second degree (N.Y. Penal Law, Sec. 220.41) and criminal possession of a controlled substance in the third and fifth degrees (N.Y. Penal Law, Secs. 220.16 and 220.09). Ind. No. 1090-569/75. Joseph DiGuiseppe pleaded guilty and was accorded youthful offender treatment. In May 1976, Argibay and petitioner Anthony DiGuiseppe went to trial, at which the police testimony described the narcotics transaction. Argibay, an architecture student at Pratt Institute, called two character witnesses. Petitioner called no witnesses. Neither defendant testified.

At the end of the day preceding the summations and the charge to the jury, Argibay's trial counsel informed the court that, as the jurors had filed out of the jury room, one of the jurors "stopped in front of me," "looked squarely in my face," and said "I hate you" (R. 690).* The attorney representing petitioner then said:

> Yes. The only thing I caught was, after she said whatever it was she said, she gave a smile. My client heard it too (R. 690-691).

The attorney for Argibay then made a motion for a mistrial or, in the alternative, for replacement of the juror by an alternate (R. 692). When his motion was denied (R. 692-93), Argibay's attorney requested that the next morning, when the juror returned to court, she be examined by the trial judge as to any bias that "would prevent her from rendering a fair verdict" (R. 693). That

* "R" refers to the Joint Record on Appeal filed in the New York Court of Appeals.

application was initially denied (R. 694). However, by the next morning, the trial judge had reconsidered the matter and offered to question the juror. Counsel for Argibay, however, had changed his mind, and requested the court not to conduct an examination of the juror, even though the trial judge indicated the juror would not be disqualified unless she was first questioned. Counsel for petitioner joined in the request that the juror not be examined. The trial judge stated that he would abide by the position taken by defense counsel, and no further inquiry was conducted.

In his instructions to the jury, the trial judge gave an "agency" charge with respect to petitioner. Under New York case law, when the issue of agency is raised, the prosecution must prove that the defendant did not act solely as an agent of the buyer. In the course of explaining the various factors which the jury could consider with respect to this issue, the judge stated, "if he received or is promised any advantage, benefit or compensation for his part, he is not an agent" (R. 860). No objection was made to this instruction.

DiGuiseppe and Argibay were convicted and each was sentenced to an indeterminate term of from six years to life imprisonment. In a motion to set aside the verdict, the defendants claimed that the trial judge had erred in not replacing the juror whom Argibay's attorney stated had made a hostile remark. That motion was denied (R. 919-27, 931-35).

On appeal, the Appellate Division affirmed the convictions, holding with respect to the claim of juror misconduct that, "by declining the offer of the court to conduct a hear-

ing, in which all pertinent facts could have been established, each counsel demonstrated a willingness tc continue to accept the juror as a judge of his client's guilt or innocence. * * *'' (Memorandum Opinion, Appendix C to the instant petition, pp. 48a-49; citation omitted). One justice dissented, stating that the trial judge could have avoided any ''possible prejudice'' by excusing the juror and seating an available alternate. (Memorandum Opinion of Justice Theodore Kupferman, Appendix C to the instant petition, p. 50.)

The New York Court of Appeals affirmed, stating:

> Extended discussions of the juror misconduct issue is not warranted. Had the trial court refused to investigate the juror's remark to defense counsel, reversal might be mandated. But investigation was offered and it was defense counsel, after requesting a *voir dire* examination only the night before, who declined the next morning to have the examination conducted. The trial court could not be faulted for refusing to disqualify the disputed juror without conducting any inquiry into the meaning of and the circumstances surrounding the objectionable statement. Hence, when inquiry was declined, defendants waived any rights they might otherwise have had on appeal. (Opinion of the New York Court of Appeals, Appendix B to the instant Petition, p. 38).

With respect to petitioner's claim that the trial judge's instructions concerning the law of agency were incorrect, the New York Court of Appeals stated

> The agency charge submitted to the jury as to DiGuiseppe was arguably error. Since no objection was taken to the charge, however, the error is not preserved. (Opinion of the New York Court of Appeals, Appendix B to the instant Petition, p. 39).

In a motion for reargument, DiGuiseppe claimed for the first time that the jury instruction on agency deprived him of his federal constitutional right to due process. With respect to the juror misconduct issue, he made a passing reference to ''due process'' and ''Justice.'' The Court of Appeals denied the motion, without opinion.

DiGuiseppe now petitions this Court for a writ of certiorari, claiming, first, that the unobjected to error in the instructions concerning the law of agency amounted to a deprivation of due process and equal protection. Second, DiGuiseppe claims that his constitutional rights to due process and trial by jury were violated when the trial judge declined to replace the juror who was reported to have made a hostile remark but whom defense counsel requested not be examined by the judge.

ARGUMENT

POINT I

Since the New York Court of Appeals ruled that under state law petitioner's claim of error in a jury instruction was not preserved for review because of the lack of any objection at trial, there is an independent and adequate state ground for the decision below [answering the petition, Point I].

Petitioner seeks review by this Court of an instruction by a state trial judge concerning the law of agency, which is a matter of state law. The New York Court of Appeals expressly refused to review petitioner's claim of error because there was no objection at trial to that instruction. (Opinion, Appendix B to the instant petition, pp. 31, 32, 39,

44.) This ruling was made in accordance with the New York statute which requires an objection to an instruction to be made at trial in order for a party to seek review of that instruction on appeal. N.Y. Criminal Procedure Law, Sec. 470.05(2) (see Appendix hereto). Petitioner's failure to object at trial to the instruction he attacks on appeal constitutes an independent and adequate state procedural ground which precludes review by this Court. *See Henry* v. *Mississippi,* 379 U.S. 443 (1965).

Petitioner notes that New York recognizes an exception to the contemporaneous objection rule for claims that a criminal trial has departed from "the mode of procedure mandated by Constitution and Statute," *People* v. *Patterson,* 39 N.Y. 2d 288 (1976), *affirmed,* 432 U.S. 197 (1977). This exception is a narrow one, permitting review, for example, of a claim that the jury had less than twelve members or a claim that the burden of proof was improperly shifted to the defense. *People* v. *Patterson, supra,* 39 N.Y. 2d at 295-96. Petitioner's claim, being an ordinary claim of error in instructions concerning a matter of state law, does not fall within the exception referred to in *Patterson* and the Court of Appeals expressly refused to consider this claim because no objection was made at trial. In view of that ruling, petitioner's claim may not be reviewed by this Court.

Moreover, in his brief to the Court of Appeals petitioner did not raise any federal constitutional question concerning the instruction on the law of agency, and his belated assertion of a new constitutional claim in a motion for reargument was not appropriate under state law. See Cohen & Karger, "Powers of the New York Court of Appeals," pp. 628-29. Accordingly, petitioner has not demonstrated that he presented his constitutional claim to the Court of Appeals, and this is an additional reason why review may not be had in this Court. *See Stembridge* v. *Georgia,* 343 U.S. 541, 547-48 (1952).

Not only does this Court lack jurisdiction, but the petition does not present an important question for this Court to review. Rather, petitioner seeks to have this Court correct a state trial judge's instruction concerning a matter of state law to which no objection was taken. As for petitioner's claim, raised for the first time in his petition to this Court, that he was denied "equal protection" because in another case (*People* v. *Rodriguez,* 56 A.D. 2d 545 (1st Dept. 1977)) the Appellate Division considered a similar claim of error in the absence of objection at trial, petitioner fails to point out that that ruling, which was an alternate ground for reversal in that case, was made "as a matter of discretion in the interests of justice," 56 A.D. 2d at 545. The Appellate Division has statutory power to order a new trial or reduce a sentence as a matter of discretion, even though an error of law is not preserved. N.Y. Criminal Procedure Law, Sec. 470.15(3) and (6) (see Appendix hereto). That on one occasion the Appellate Division, considering a different record, which required reversal on another ground, decided "in the interest of justice" to discuss an error which had not been objected to, does not give rise to a substantial claim of denial of "equal protection" to petitioner.

POINT II

No substantial question is presented by petitioner's claim that, although defense counsel declined the trial judge's offer to examine a juror who had reportedly made a hostile remark, the trial judge was nevertheless constitutionally required to replace that juror with an alternate [answering the petition, Point II].

Since defense counsel declined the trial judge's offer to examine the juror who had reportedly made a hostile remark, petitioner cannot now complain that no such inquiry was conducted. Rather, petitioner can only assert the bald proposition that once the attorney for his co-defendant stated that a juror had said to that attorney, "I hate you," the trial judge was required, without conducting any examination of that juror, either to declare a mistrial or to replace that juror with an alternate. Moreover, it appears that the juror's remark was directed to Argibay's attorney and not to petitioner's attorney, at whom the juror was stated to have smiled, so that the possibility of prejudice as to petitioner was at most indirect. Petitioner's constitutional claim is wholly insubstantial and does not merit review by this Court.

It was certainly appropriate for the trial judge to question the juror before discharging her. The court was not required to act merely upon a statement by defense counsel as to what had occurred, particularly where counsel's statements created some doubt about what had transpired. For one thing, questioning of the juror by the judge might have shown that co-defendant Argibay's attorney

had misunderstood what was said. This possibility is suggested by the apparent inconsistency between the statement of Argibay's attorney that the juror said "I hate you," and the statement of petitioner's attorney that the juror had smiled after saying whatever it was she said. Moreover, the trial judge was entitled to question the juror to determine whether, if she had in fact made that statement, it was intended as a hostile remark. Since the juror was reported to have smiled after saying what she said, there was a substantial possibility that it was intended to be a display of humor, not hostility. If so, the juror's remark would not have been a demonstration of bias at all, and the juror could not have been considered grossly unqualified to serve on the case. *See State* v. *Kerr*, 14 Wash. App. 584, 544 P.2d 38 (1975) (motion for mistrial properly denied where juror remarked, "Here comes the enemy" when defense counsel entered the courtroom; remark had been made laughingly and juror had responded humorously to questions on voir dire).

In these circumstances, it was entirely appropriate for the trial judge to examine the juror in order to determine whether the remark was made and, if so, under what circumstances. As the judge recognized, such an examination might not have been conclusive (R. 693), but it was certainly the proper step to take in order to pursue the matter. Since both defense counsel requested that the judge refrain from taking that step, there is no substantial claim preserved for review.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Applicable Statutes

1. New York Criminal Procedure Law Section 470.05: Determination of Appeals; General Criteria.

* * *

2. For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

2. New York Criminal Procedure Law, Section 470.15: Determination of Appeals by Intermediate Appellate Courts; Scope of Review.

* * *

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

* * *

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.